

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Amendments to Commission Publishing Rules

Docket No. RM2016-5

PUBLIC REPRESENTATIVE COMMENTS ON
PROPOSED AMENDMENTS TO 39 C.F.R. PART 3020

(February 26, 2016)

I. INTRODUCTION

The Commission issued a notice of proposed rulemaking to consider amendments to the Commission's rules concerning the product lists.¹ In the Notice, the Commission provided interested persons, including the undersigned Public Representative, with an opportunity to comment on the proposed rules.

For the reasons discussed below, the Public Representative supports eliminating the *Federal Register* publication requirements, but does not support removing provisions in part 3020 that require the Commission to provide an opportunity or specified period for public comment. If the Commission decides to eliminate provisions providing an opportunity or specified period for public comment, the Public Representative recommends that the Commission issue a further notice of proposed rulemaking addressing the issues identified in Section III.B, below.

¹ Notice of Proposed Rulemaking Regarding Minor Amendments to Commission Rules Regarding Proposed Modifications to the Mail Classification Schedule, January 20, 2016 (Notice).

II. BACKGROUND

Requests to modify the market dominant or competitive product lists (Requests) may be initiated by the Postal Service, users of the mail, or the Commission.² In each case, “[t]he Commission will establish a docket for each request ... promptly publish notice of the request in the *FEDERAL REGISTER*, and post the filing on its Web site.”³ The notice of Request must include, among other things, “[a] specified period for public comment[.]”⁴

Similar procedures apply to requests by the Postal Service to make material changes or minor corrections to product descriptions in the Mail Classification Schedule (MCS). See 39 C.F.R. part 3020, subpart E. When noticing material changes and minor corrections to the product descriptions, the Commission is required to “[p]rovide interested persons with an opportunity to comment on whether the proposed changes are consistent with title 39 and applicable Commission regulations.” *Id.* §§ 3020.82(e), 3020.91(e). The Commission’s rules do not require the Commission or the Postal Service to publish notices of material changes and minor corrections in the *Federal Register*.

The proposed rules affect two aspects of 39 C.F.R. part 3020. First, they eliminate regulations that require the Commission to publish in the *Federal Register* notices of Requests initiated by either the Postal Service or users of the mail.⁵ Second, the proposed rules remove provisions in part 3020 that require the Commission to provide an opportunity or specified period for public comment.

² 39 U.S.C. § 3642(a); 39 C.F.R. part 3020, subparts B, C, and D.

³ 39 C.F.R. §§ 3020.33, 3020.53, 3020.73.

⁴ *Id.* §§ 3020.33(e), 3020.53(e), 3020.73(e).

⁵ The Commission states that the proposed rules eliminate the Commission’s obligation to publish “the orders identifying draft MCS changes approved by the Commission but not yet finalized in a modification to the MCS, which are duplicative of the quarterly MCS update.” Notice at 1-2. It is unclear what orders are being referred to. The Commission publishes in the *Federal Register* notice of Requests and notices identifying updates to the product lists. There are no “orders identifying draft MCS changes approved by the Commission but not yet finalized in a modification to the MCS”

III. ANALYSIS

A. Publication Requirement

The proposed rules eliminate provisions that require the Commission to publish in the *Federal Register* notice of Requests initiated by either the Postal Service or users of the mail. Specifically, the proposed rules eliminate the phrase “promptly publish notice of the request in the *Federal Register*,” in the introductory text of 39 C.F.R. §§ 3020.33 and 3020.53. See Notice at 5-6. The revised introductory text for these regulations would read, “The Commission will establish a docket for each request to modify the market dominant list or the competitive product list and post the filing on its Web site. The notice shall include:” *Id.*

However, the proposed rules do not amend similar introductory text in 39 C.F.R. § 3020.73, which requires *Federal Register* publication of notice of Requests initiated by the Commission. It appears that the Commission intended to eliminate the *Federal Register* publication requirement in section 3020.73 because it states that “the Commission is not obligated to provide notice-and-comment for modifications proposed by *itself* or third parties, such as the Public Representative or users of the mail.” Notice at 3 (emphasis added). The Commission should clarify its intentions concerning Requests initiated by the Commission.

The Commission provides two reasons for eliminating the *Federal Register* publication requirement. First, it asserts that there is no statutory requirement for the Commission to publish notice of Requests in the *Federal Register*. *Id.* at 1. Second, it points out that notice of Requests initiated by the Postal Service duplicate notices the Postal Service publishes in the *Federal Register*. *Id.* at 1-2.

The Public Representative supports removing the *Federal Register* publication requirement for notice of Requests. This removal is consistent with the Commission's prior amendment to 39 C.F.R. § 3001.17, which eliminated the requirement that the

Commission publish notice of post office closing appeals in the *Federal Register*.⁶ The removal is also supported by 39 U.S.C. § 3642(d), which contains “Notification and Publication Requirements.” Section 3642(d)(1) requires the Postal Service to publish in the *Federal Register* a notice concerning its request to modify the product lists. Section 3642(d)(2) requires the Commission to publish revisions to the product lists in the *Federal Register*.⁷ If Congress had intended for the Commission to publish notice of Requests in the *Federal Register*, it would have included this requirement under section 3642(d).

If the Commission decides to eliminate the *Federal Register* publication requirements, the Public Representative makes the following recommendations. First, the Commission should amend 39 C.F.R. § 3020.73 in addition to sections 3020.33 and 3020.53 if the Commission intends to eliminate the publication requirement for notice of Requests initiated by Commission.⁸ Second, the introductory text should link the first and second sentences by clarifying that the Commission will post notice of Requests on its web site. For example, the introductory text could be revised by adding the language in bold: “The Commission will establish a docket for each request to modify the market dominant list or the competitive product list and post **a notice describing** the filing on its Web site. The notice shall include:” See Notice at 5-6.

Third, the Commission should consider not publishing in the *Federal Register* notices of Postal Service proposals to change a rate or class not of general applicability

⁶ Docket No. RM2011-13, Order Adopting Final Rules Regarding Appeals of Postal Service Determinations to Close or Consolidate Post Offices, January 25, 2012, at 2 (Order No. 1171). The Commission should also consider revising rule 3001.17 to distinguish between notices of proceeding and other types of notices, such as the ones establishing dockets and providing an opportunity to comment.

⁷ The Commission states it will continue to publish “actual modifications to the MCS in the *Federal Register*” pursuant to 39 C.F.R. § 3020.14. Notice at 2. Section 3020.14 and 39 C.F.R. part 3020, subparts B, C, and D refer to modifications to the *product lists* described in the Mail Classification Schedule. The Commission should distinguish between products lists and the MCS.

⁸ The Commission should also amend section 3020.53(d) by changing “Office” to “officer” consistent with sections 3020.33 and 3020.73.

pursuant to 39 C.F.R. 3015.5.⁹ There is no statutory or regulatory requirement for the Commission to publish these notices in the *Federal Register*. 39 U.S.C. § 3632(b)(2) requires the Postal Service to publish decisions concerning changes in rates or classes of *general* applicability in the *Federal Register*. See 39 C.F.R. §§ 3015.2 to 4. However, there is no *Federal Register* publication requirement for changes in rates or classes not of general applicability. See 39 C.F.R. § 3632(b)(3). It is important to publish decisions concerning changes in rates or classes of general applicability in the *Federal Register* because those changes apply “to all mailers equally on the same terms and conditions.” *Id.* § 3001.5(u). By contrast, *Federal Register* publication is not necessary for changes to rates or classes not of general applicability because those changes affect a smaller number of mailers.

B. Opportunity for Comment

The proposed rules remove provisions in part 3020 that require the Commission to provide an opportunity or specified period for public comment in notice of Requests and notices of material changes or minor corrections to the MCS. Specifically, the proposed rules eliminate provisions in 39 C.F.R. §§ 3020.33 and 53 that require notice of Requests initiated by the Postal Service and users of the mail to provide “A specified period for public comment[.]”¹⁰ Similarly, for notices of material changes and minor corrections to the product descriptions, the proposed rules eliminate provisions requiring the Commission to “[p]rovide interested persons with an opportunity to comment on whether the proposed changes are consistent with title 39 and applicable Commission regulations.” *Id.* at 6-7; see 39 C.F.R. §§ 3020.82(e), 3020.91(e).

⁹ For example, the Commission publishes in the *Federal Register* notices concerning additional Global Expedited Package Service 3 negotiated service agreements. Docket No. CP2016-101, Notice and Order Concerning Additional Global Expedited Package Services 3 Negotiated Service Agreement, February 16, 2016 (Order No. 3079).

¹⁰ See Notice at 5-6. As the Public Representative previously noted, the proposed rules do not amend section 3020.73 concerning notice of Requests initiated by the Commission.

These proposed changes raise significant questions and concerns. First, the body of the Notice indicates that the proposed rules only affect *Federal Register* publication requirements. For example, it describes the proposed rules as “minor changes to rules that obligate the Commission to publish, in the *Federal Register*” notices and orders regarding changes to the product lists. Notice at 1. Also, the title of Section II is “Proposed Changes to the Publishing Requirements of Product Lists under 39 CFR Part 3020.” *Id.* at 2. It was not clear that proposed rules also remove opportunities or specified periods for public comment until the end of the Notice, which lists the specific changes made to 39 C.F.R. part 3020. Eliminating opportunities or specified periods for public comment is not a minor change. Such a significant change should be clear in the body of the Notice.

Second, the Commission does not clearly explain why it proposes to remove provisions providing an opportunity to comment. The rationale for removing these provisions appears to be the following:

The MCS is an interpretive rule, as it serves an advisory function of explaining how the Postal Service categorizes mail products and assures the Postal Service will provide a consistent and uniform interpretation of these products. The Commission’s notice-and-comment requirements, based on 5 U.S.C. § 553, do not apply to interpretative rules Similarly, again because the MCS is an interpretive rule, the Commission is not obligated to provide notice-and-comment for modifications to the MCS proposed by itself or third parties, such as the Public Representative or users of the mail.

Notice at 2-3.

This discussion does not adequately explain why these comment provisions should be removed or the legal justification for doing so. In its comments, PostCom discusses issues with this rationale and points out how the proposed rules (if enacted) would have adversely major mail classification cases.¹¹ It concludes that eliminating provisions that provide for public comment will “deprive[] mailers of an important opportunity to voice

¹¹ Comments of the Association for Postal Commerce, February 26, 2016, at 2-3.

concerns that the proposed changes do not comply with the law.” *Id.* at 1. The Public Representative agrees with PostCom’s comments and also observes that the proposed rules retain the requirement that the Commission appoint a Public Representative. Without a specified comment period, it is unclear what the role of the Public Representative is and whether he or she can submit comments if the Commission does not provide an opportunity or period for public comment.

The Public Representative recommends that the Commission reconsider whether eliminating the opportunity to comment is prudent in light of issues raised by PostCom and the Public Representative. If the Commission decides to proceed, it should issue a further notice of proposed rulemaking to provide a more thorough explanation of how the MCS is an interpretive rule and whether these provisions would adversely affect the interests of mailers and the general public. The Commission also should clarify when and under what circumstances it will provide an opportunity for comment in proceedings initiated under 39 C.F.R. part 3020.

IV. CONCLUSION

For the reasons explained above, the Public Representative supports eliminating the *Federal Register* publication requirements, but does not support removing provisions in part 3020 that require the Commission to provide an opportunity or specified period for public comment.

Respectfully Submitted,

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